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No. 80-847

In the Supreme Court of the United States

OCTOBER TERM, 1980

COMMON CAUSE, ET AL., APPELLANTS,

v.

HARRISON SCHMITT, ET AL., APPELLEES,

and

FEDERAL ELECTION COMMISSION,
INTERVENOR-APPELLEE.

BRIEF FOR INTERVENOR-APPELLEE FEDERAL ELECTION COMMISSION

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QUESTION PRESENTED

Whether review by this Court is unavailable under 28 U.S.C. §§ 1252, 1253 or 26 U.S.C. § 9011(b) where the district court dismissed appellants' cause of action as moot without addressing any substantive constitutional issues, and where the district court expressly declined to hold that appellants had the capacity to bring their cause of action pursuant to 26 U.S.C. § 9011(b) and Article III of the Constitution of the United States.

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* Other parties to this action are Americans for Change, Americans for an Effective Presidency, Fund for a Conservative Majority, Carl T. Curtis, Winifred Long and David Cohen. This action was consolidated with *Federal Election Commission* v. *Americans for Change, et al.*, No. 80-1067. *See* Joint Appendix at 18.

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OPINION BELOW

The opinion of the district court is not yet officially reported but appears at Appendix A of Common Cause's Jurisdictional Statement in No. 80-847 at 1a-33a ("C.C. J.S. in No. 80-847 at ——"), and Appendix A of the Federal Election Commission's Jurisdictional Statement in No. 80-1067 at 1a-34a. ("FEC J.S. in No. 80-1067 at ——").

JURISDICTION

Appellants assert jurisdiction pursuant to 26 U.S.C. § 9011(b) and 28 U.S.C. §§ 1252 and 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Article III, Section 2, Clause 1 of the Constitution of the United States and the construction and application of 26 U.S.C. § 9011(b) and 28 U.S.C. §§ 1252, 1253, set forth in the Appendix ("App."), *infra.*

STATEMENT OF THE CASE

By way of this appeal, Common Cause, Winifred Long and David Cohen (collectively referred to as "Common Cause") ask this Court to review a decision rendered by the United States District Court for the District of Columbia (three-judge court) in *Federal Election Commission* v. *Americans for Change, et al.*, No. 80-1067, an action brought by the Federal Election Commission [1] seeking construction of 26 U.S.C. § 9012(f) as applicable to defendants. Common Cause was not a party to the Commission's action and its motion to intervene as a party-plaintiff pursuant to Fed. R. Civ. P. 24(a), (b) was denied by the district court.[2]

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[1] The Federal Election Commission ("FEC" or "Commission") is the independent agency of the United States government vested with the authority to litigate questions involving the construction, implementation and validity of the Presidential Election Campaign Fund Act, 26 U.S.C. §§ 9001-9013 ("Fund Act"), as well as the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §§ 431-455 ("FECA"), and the Presidential Primary Matching Payment Account Act, 26 U.S.C. §§ 9031-9042. The Commission is also vested with exclusive jurisdiction with respect to civil enforcement of these laws. *See* 2 U.S.C. §§ 437c(b)(1), 437d(a)(6), 437d(e); 26 U.S.C. §§ 9005(a), 9007(a) and (b), 9010(c), 9011(b), 9036(a) and (b), 9040(b), (c) and (d).

[2] The Commission had opposed intervention by Common Cause on the grounds that 26 U.S.C. § 9011(b) is limited to actions brought by the "Commission, the national committee

The proceedings below may be summarized briefly.[3] Common Cause brought suit pursuant to 26 U.S.C. § 9011(b) and 28 U.S.C. § 1331 seeking a declaration that Americans for Change ("AFC"), its Chairman and its Treasurer were in violation of various provisions of the Fund Act.[4] Count I of the complaint alleged that AFC's expenditures to further the election of Ronald Reagan exceeded $1,000 in violation of 26 U.S.C. § 9012(f)(1). Count II alleged that AFC's expenditures would be "conducted in tandem with and parallel to the official Reagan campaign" and would therefore constitute unlawful contributions to the Reagan campaign pursuant to 26 U.S.C. §§ 9002(11), 9003(b)(1)-(2), 9012(a)(1) and 9012 (b)(1). Common Cause asked that the court issue an injunction barring the activities alleged in both counts of the complaint and that a three-judge court be convened pursuant to 26 U.S.C. § 9011(b)(2). The Commission intervened as a party defendant in *Common Cause* v. *Schmitt* and moved to dismiss on the ground that the three-judge court lacked jurisdic-

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of any political party, and individuals eligible to vote . . . ."; that Common Cause lacked a legally protectable interest in the Commission's action; and that such intervention would be inconsistent with the Commission's exclusive enforcement jurisdiction. *See* note 1, *supra*. Common Cause has not appealed the district court's dismissal of the motion to intervene. *See also Republican National Committee* v. *Federal Election Commission*, 461 F. Supp. 570, 577 (S.D.N.Y. 1978) (motion of Common Cause to intervene denied).

[3] *See also* FEC J.S. in No. 80-1067 at 5-7; FEC brief in No. 80-1067 at 2-5.

[4] *See* C.C. J.S. in No. 80-847, App. I at 69-84a. *Cf. Hunt* v. *Washington Apple Advertising Commission*, 432 U.S. 333 (1977) and note 23 *infra*.

tion over the subject matter of the *Common Cause* complaint.

Federal Election Commission v. *Americans for Change, et al.* is an entirely separate action instituted by the Commission pursuant to 26 U.S.C. §§ 9011 (b) and 9010(c) against AFC, Americans for an Effective Presidency ("AEP") and Fund for a Conservative Majority ("FCM") seeking construction of 26 U.S.C. § 9012(f)(1) as applicable to certain expenditures by defendants. A three-judge court was convened pursuant to 26 U.S.C. § 9011(b)(2), and the Commission, AFC, AEP and FCM moved for summary judgment. On August 19, 1980, the three-judge court heard oral argument on the scope and constitutionality of § 9012(f); on August 28, 1980, the court issued two expedited Orders disposing of *Federal Election Commission* v. *Americans for Change* and *Common Cause* v. *Schmitt*; and on September 24, 1980, the court, *sua sponte*, ordered the cases consolidated.

The court set forth its reasoning for its Orders of August 28 in an opinion dated September 30, 1980. In deciding *Federal Election Commission* v. *Americans for Change*, the court held 26 U.S.C. § 9012(f) unconstitutional under the first amendment. In disposing of *Common Cause* v. *Schmitt*, the court dismissed Count I as mooted by its decision in *Federal Election Commission* v. *Americans for Change, et al.*, and dismissed Count II as an impermissible attempt by private plaintiffs to enforce the Fund Act in direct contravention of the Commission's exclusive enforcement jurisdiction. FEC J.S. in No. 80-1067, App. A at 28a-32a.[5]

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[5] The Court expressed "no opinion whether Common Cause possessed the requisite Article III characteristics to press

On September 26, 1980, Common Cause filed a notice of appeal to this Court in *Common Cause* v. *Schmitt*. In its Jurisdictional Statement, Common Cause expressly declined to appeal the court's dismissal of Count II. C.C. J.S. in No. 80-847 at 10 n.15. Nor has Common Cause appealed from the district court's dismissal of Count I as moot. Rather, asserting jurisdiction pursuant to 26 U.S.C. § 9011 (b) and 28 U.S.C. §§ 1252, 1253, Common Cause asked this Court to review the correctness of the district court's ruling on the constitutionality of 26 U.S.C. § 9012(f) in *Federal Election Commission* v. *Americans for Change*, No. 80-1067.[6]

On October 8, 1980, the Commission filed its notice of appeal to this Court in *Federal Election Commission* v. *Americans for Change*. In its Jurisdictional Statement, the Commission sought review of the district court's holding that § 9012(f) is facially unconstitutional under the first amendment. On February 23, 1981, this Court noted probable jurisdiction in both cases and ordered the cases consolidated for oral argument.

Count I of its lawsuit" before the three-judge court. FEC J.S. in No. 80-1067, App. A at 28a. The court did, however, indicate that the right of Common Cause to bring an action pursuant to 26 U.S.C. § 9011(b) to "implement or construe" the Fund Act is "equivocal." FEC J.S. in No. 80-1067, App. A at 5a.

[6] As a "threshold question," Common Cause also asked this Court to consider whether it should summarily reverse the decision below and remand the case for further factual development.

SUMMARY OF ARGUMENT

Common Cause presently seeks to invoke the appellate jurisdiction of this Court pursuant to 28 U.S.C. §§ 1252, 1253 and 26 U.S.C. § 9011(b) to review the constitutionality of 26 U.S.C. § 9012(f) despite the fact that the court below did not hold § 9012(f) unconstitutional in *Common Cause* v. *Schmitt*. The Commission respectfully submits that none of these jurisdictional provisions may be deemed to confer upon Common Cause a right to appeal the district court's judgment in *Federal Election Commission* v. *Americans for Change*. Accordingly, this Court is without appellate jurisdiction to decide the question presented in *Common Cause* v. *Schmitt*.

Moreover, the Commission respectfully submits that the district court correctly declined to rule on the difficult jurisdictional questions presented by Common Cause's attempt to invoke 26 U.S.C. § 9011 (b) as a jurisdictional base where such a ruling was unnecessary because of the substantive ruling in *Federal Election Commission* v. *Americans for Change*. Thus, because the Commission has properly appealed from the district court's decision and has presented the issue of the constitutionality of 26 U.S.C. § 9012(f) for this Court's review in *Federal Election Commission* v. *Americans for Change*, this Court need not address the jurisdictional deficiencies inherent in the appeal of *Common Cause* v. *Schmitt*. However, should this Court wish to address the jurisdictional question, the Commission submits that this Court must conclude that it lacks subject matter jurisdiction over the Common Cause suit pursuant to 26 U.S.C. § 9011(b) and Article III of the Constitution of the United States.

ARGUMENT

NEITHER 28 U.S.C. §§ 1252, 1253, NOR 26 U.S.C. § 9011(b) PROVIDE A JURISDICTIONAL BASE FOR THIS COURT TO REVIEW *COMMON CAUSE* v. *SCHMITT*.

A. Common Cause May Not Rely On the General Jurisdictional Provisions of Title 28 Where Congress Has Enacted 26 U.S.C. § 9011(b) as a Specific Mechanism for the Implementation and Construction of the Fund Act by Federal Courts.

The complaint in *Common Cause* v. *Schmitt* asserted jurisdiction under 28 U.S.C. § 1331[7] as well as 26 U.S.C. § 9011(b). Appellants now seek to invoke this Court's appellate jurisdiction pursuant to §§ 1252 and 1253 of Title 28. Where, however, Congress has provided specific mechanisms for the extension of federal court jurisdiction, plaintiffs may not bypass such mechanisms and ground jurisdiction over their suit on 28 U.S.C. § 1331 and, on appeal, on 28 U.S.C. §§ 1252 and 1253. Special statutory schemes, such as provided by 26 U.S.C. § 9011(b), are the exclusive avenues for review by federal courts and preclude consideration of such claims pursuant to the general jurisdictional statutes of Title 28.[8] *Brown* v. *General Services Administration*, 425 U.S. 820, 834 (1976); *American Power & Light Co.* v. *Securities and Exchange Commission*, 325 U.S. 385, 389 (1945). *See also Ewing* v. *Mytinger & Cassel-*

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[7] The three-judge court noted that, "whether a single judge district court would have jurisdiction under 28 U.S.C. § 1331 (1976) (federal question jurisdiction) is not before this court." FEC J.S. in No. 80-1067, App. A at 29a n.47.

[8] For reasons stated *infra* at 12-16, neither may *Common Cause* invoke a federal court's jurisdiction pursuant to 26 U.S.C. § 9011(b).

berry, 339 U.S. 594 (1950); *United States* v. *Babcock*, 250 U.S. 328 (1919); *Grutka* v. *Barbour*, 549 F.2d 5, 7 (7th Cir. 1977) *cert. denied*, 431 U.S. 908 (1977); *Atlantic & Gulf Stevedores, Inc.* v. *Donovan*, 274 F.2d 794, 798 n.11 (5th Cir. 1960).

The exclusivity of 26 U.S.C. § 9011(b) as a judicial procedure for review of actions "as may be appropriate to implement or construe" the Fund Act is reinforced by the legislative history accompanying § 9011(b) and by the 1974 FECA amendments which vested exclusive enforcement jurisdiction in the Commission. *See* discussion *infra* at 14-16. Congress clearly intended that § 9011(b) provide limited jurisdiction for federal courts to consider certain kinds of questions in suits brought by specific classes of plaintiffs. To permit Common Cause to invoke the general jurisdictional provisions of Title 28 in an action raising a question properly brought under § 9011(b) or one which should properly have been presented in the first instance to the Commission would subvert the intent of Congress underlying the enactment of 26 U.S.C. § 9011(b) and 2 U.S.C. § 437g.[9]

B. Common Cause's Appeal Pursuant to 28 U.S.C. §§ 1252, 1253 Is, In Any Event, Inappropriate Because No Substantive Constitutional Issues Were Decided in *Common Cause* v. *Schmitt*.

By its very terms, 28 U.S.C. § 1252 limits this Court's appellate jurisdiction to the review of federal court judgments which have invalidated an Act of Congress on constitutional grounds.[10] Since the dis-

[9] Appellants' failure to meet the Article III requirements of standing would, in any event, preclude jurisdiction under Title 28. *See* discussion, *infra* at 16-19.

[10] *See* App. at 2a for the complete text of 28 U.S.C. § 1252.

trict court did not hold an Act of Congress unconstitutional in *Common Cause* v. *Schmitt*, but merely dismissed the case as moot, 28 U.S.C. § 1252 is not an appropriate basis for the exercise of this Court's appellate jurisdiction in *Common Cause* v. *Schmitt*, No. 80-847.[11]

While this Court has held that an appeal under § 1252 brings before the Court not only the constitutional questions but threshold issues of subject matter

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[11] While the lower court could have held § 9012(f) unconstitutional in *Common Cause* v. *Schmitt* based on its decision and opinion in *Federal Election Commission* v. *Americans for Change*, the court very carefully avoided reaching any decision as to Count I in *Common Cause* v. *Schmitt* so as to avoid an unnecessary ruling on the jurisdictional questions presented therein. Indeed, in two recent opinions in cases which raised "identical issues," the court decided the second case based on reasons stated in its earlier opinion. *See Federal Election Commission* v. *Machinists Non-Partisan Political League*, No. 80-1136 (D.C. Cir. May 19, 1981) and *Federal Election Commission* v. *Citizens for Democratic Alternatives in 1980*, No. 80-1256 (D.C. Cir. May 19, 1981) (abbreviated opinion). *See* Rule 13(c) of the General Rules of the United States Court of Appeals for the District of Columbia Circuit. And, in *Martin Tractor Co.* v. *Federal Election Commission, National Chamber Alliance for Politics* v. *Federal Election Commission*, 627 F.2d 375 (D.C. Cir. 1980), *cert. denied, National Chamber Alliance for Politics* v. *Federal Election Commission*, —— U.S. ——, 101 S.Ct. 360 (1980), the court, noting that the consolidated cases raised "nearly identical" issues, rested its decision to affirm the district court's dismissal of *National Chamber* on reasons set forth in its opinion in *Martin Tractor*. In *Common Cause* v. *Schmitt*, however, the court dismissed "Count I of Common Cause's action *as mooted* pursuant to our decision in the FEC action . . ." thus allowing the court to "express no opinion whether Common Cause possessed the requisite Article III characteristics to press Count I of its lawsuit. . . ." FEC J.S. in No. 80-1067 at 28a (emphasis added).

jurisdiction as well,[12] the literal terms and the underlying policies of § 1252 require that this Court decline to exercise jurisdiction in this case:

> The language of [§ 1252] sufficiently demonstrates its purpose: to afford immediate review in this Court in civil actions to which the United States or its officers are parties and thus will be bound by a holding of unconstitutionality.

McLucas v. *DeChamplain*, *supra* at 31. Since the district court held 26 U.S.C. § 9012(f) unconstitutional in *Federal Election Commission* v. *Americans for Change*, and since the Commission has properly appealed from that decision to this Court, there is no risk that the Commission or any other agency of the United States will be bound by a holding of unconstitutionality without having had the opportunity to obtain this Court's immediate review. Thus, even the threshold question of subject matter jurisdiction in *Common Cause* v. *Schmitt* is not properly before this Court under § 1252.

Invocation of the Court's appellate jurisdiction under 28 U.S.C. § 1253 is also unavailable to appellants.[13] A direct appeal pursuant to 26 U.S.C. § 1253 will lie only where a three-judge court entertains the constitutional issues presented in a claim, decides the action on constitutional grounds alone, and grants or denies an injunction. *Gonzalez* v. *Automatic Employees Credit Union*, 419 U.S. 90 (1974). Indeed, in *MTM, Inc.* v. *Baxley*, 420 U.S. 799 (1975), this Court made clear that,

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[12] *McLucas* v. *DeChamplain*, 421 U.S. 21, 31-32 (1975); *United States* v. *American Friends Service Committee*, 419 U.S. 7, 12 n.7 (1974).

[13] *See* App. at 2a for the complete text of 28 U.S.C. § 1253.

> . . . an appeal will lie to this Court under § 1253 from the order of a three-judge court denying interlocutory or permanent injunctive relief only where such order rests upon resolution of the merits of the constitutional claim presented below.

Id. at 804.[14] In *Common Cause* v. *Schmitt*, the plaintiffs alleged in Count I of their amended complaint that AFC, AEP and FCM intended to violate 26 U.S.C. § 9012(f) and sought an injunction barring defendants' alleged violations of the Fund Act. The three-judge court did not enter an order granting or denying the injunction but simply dismissed Count I of the complaint as moot.[15] Accordingly, prior decisions of this Court prevent Common Cause from invoking the Court's appellate jurisdiction under 28 U.S.C. § 1253 to review the constitutionality of § 9012 (f).[16]

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[14] In both *Gonzalez* and *MTM* this Court held that an appeal was appropriate initially to the court of appeals. *See also Valentino* v. *Howlett*, 528 F.2d 975 (7th Cir. 1976) (dismissal by a three-judge court on grounds of mootness was properly reviewed by the court of appeals); *Mendez* v. *Heller*, 530 F.2d 457 (2nd Cir. 1976) (appeal from dismissal for want of a justiciable controversy is properly heard by the court of appeals).

[15] Dismissal as moot was proper since the district court's ruling in *Federal Election Commission* v. *Americans for Change* left no live controversy remaining in *Common Cause* v. *Schmitt*. *Rosado* v. *Wyman*, 437 F.2d 619, 625 (2nd Cir. 1970), *aff'd mem.*, 402 U.S. 991 (1971); 6A Moore, Federal Practice, ¶ 57.13 at 57.138 (2d ed. 1979).

[16] As discussed, *supra*, the three-judge court never decided whether it had subject matter jurisdiction over Count I of *Common Cause* v. *Schmitt* and, accordingly, had no occasion to consider whether it was properly convened to hear Count I. If the three-judge court was without subject matter juris-

C. Appellants in *Common Cause* v. *Schmitt* May Not Invoke This Court's Jurisdiction Pursuant to 26 U.S.C. § 9011(b) Because Count I, Like Count II of *Common Cause* v. *Schmitt* Is an Impermissible Attempt by Private Plaintiffs to Enforce The Fund Act.

Common Cause also relied on 26 U.S.C. § 9011(b) as a basis for the three-judge district court's jurisdiction to hear and decide *Common Cause* v. *Schmitt*,[17] and now relies on this same provision to invoke the jurisdiction of this Court on appeal. However, § 9011 (b) cannot be construed as conferring either appellate or subject matter jurisdiction over the appeal taken in *Common Cause* v. *Schmitt*.[18]

Even if appellants in *Common Cause* v. *Schmitt* may appeal to this Court the district court's ruling in *Federal Election Commission* v. *Americans for Change* that 26 U.S.C. § 9012(f) is unconstitutional, this Court must consider whether it pos-

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diction over Count I, this Court would similarly be without jurisdiction over the instant appeal. *See* discussion, *infra* at 12-19.

[17] *See* App. at 1a for the full text of 26 U.S.C. § 9011(b).

[18] While this Court has not yet construed the scope of its appellate jurisdiction under § 9011(b)(2), the Commission submits that at a minimum the question which an appellant presents for review must actually have been decided against the appellant by the court below. *See Buckley* v. *Valeo*, 424 U.S. 1, 9, 10 n.6 (1976). To permit Common Cause to appeal from a decision rendered in a case to which it was not a party would contravene the most fundamental concepts of appellate review. In view of the fact that this Court has noted probable jurisdiction to review the constitutionality of 26 U.S.C. § 9012(f) in *Federal Election Commission* v. *Americans for Change*, the Commission respectfully submits that this Court should properly decide the constitutionality of § 9012(f) in *Federal Election Commission* v. *Americans for Change* and remand *Common Cause* v. *Schmitt* to the district court for

sesses subject matter jurisdiction over *Common Cause* v. *Schmitt* pursuant to 26 U.S.C. § 9011(b) prior to deciding any substantive issues therein. The Commission submits that this Court lacks subject matter jurisdiction over *Common Cause* v. *Schmitt* because Count I, like Count II, is outside the jurisdiction conferred by 26 U.S.C. § 9011(b). Rather, Count I represents an attempt by private plaintiffs to enforce the Fund Act, in direct violation of the Commission's exclusive enforcement jurisdiction. FEC J.S. in No. 80-1067, App. A at 28a, 31a, 32a. *See also* note 21, *infra* and cases cited therein.

The district court properly found it unnecessary to decide whether Common Cause could press Count I of its lawsuit.[19] However, the court's analysis in dismissing Count II compels the same result with respect to Count I. As the court observed: "Congress has legislated in no uncertain terms with respect to FEC dominion over the election law." FEC J.S. in No. 80-1067, App. A at 31a; 2 U.S.C. § 437c(b)(1). Actions to enforce provisions of FECA, the Fund Act

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determinations as to whether that case remains moot or whether it presents a justiciable controversy. Such a disposition would enable the district court to consider more fully the threshold issue of subject matter jurisdiction over Count I of *Common Cause* v. *Schmitt*.

[19] 26 U.S.C. § 9011(b)(2) required the district court to render its decision construing 26 U.S.C. § 9012(f) as expeditiously as possible. In view of the magnitude of the constitutional questions involved in construing § 9012(f), the district court properly confined its resolution of these issues to its disposition of *Federal Election Commission* v. *Americans for Change*, and properly declined to address the jurisdictional ambiguities inherent in Count I of *Common Cause* v. *Schmitt* where it was unnecessary to do so. *Cf. O'Brien* v. *Brown*, 409 U.S. 1 (1972).

or the Primary Matching Payment Account Act—actions like both Count I and Count II of the Common Cause complaint—must be first processed through and acted upon by the Commission.[20] Private rights of enforcement will not be lightly construed in a statute but are found only where Congress has clearly manifested such an intention. *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11 (1979); *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 568 (1979); *Cannon* v. *University of Chicago*, 441 U.S. 677, 688 (1979).

Moreover, this Court has already concluded that Congress did not create a private right of action for enforcement of the Federal Election Campaign Act. *Cort* v. *Ash*, 422 U.S. 66, 77 (1975).[21] Similarly,

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[20] *See* 2 U.S.C. § 437g for the detailed enforcement procedures enacted by Congress for the processing of complaints brought to the Commission. *See also* H.R. Rep. No. 94-917, 94th Cong., 2d Sess. 4 (1976), adopted at H.R. Conf. Rep. No. 94-1057, 94th Cong., 2d Sess. 35 (1976); 122 Cong. Rec. 12,199 (1976) (remarks of Rep. Hays).

[21] This Court relied on Congress's creation of the Federal Election Commission in 1974 as support for the conclusion that Congress intended no private right of action in the 1971 Act. *Cort* v. *Ash*, 422 U.S. at 74-76. Subsequent court decisions have reaffirmed that conclusion. In *Gabauer* v. *Woodcock*, 594 F.2d 662, 673 (8th Cir. 1979) the court concluded that the same result was clear under the 1976 FECA Amendments. The 1976 FECA Amendments made clear that the enforcement scheme of 2 U.S.C. § 437g applied to alleged violations of not only Title 2, but of Chapters 95 and 96 of Title 26, as well. The court also specifically noted that it would not permit circumvention of that enforcement scheme "under the guise of a parallel cause of action". *Id.* at 673. *See also In re Carter-Mondale Reelection Committee, Inc.* v. *Federal Election Commission*, 642 F.2d 538 (D.C. Cir. 1980); *Durkin* v. *Federal Election Commission*, 2 Fed. Elec. Camp. Fin. Guide

§ 9011(b) affords no private right of enforcement. Rather, Congress sought by the enactment of § 9011 (b) to extend federal court jurisdiction to hear and decide, on an expedited basis, questions of the proper construction of the Fund Act so that public financing for presidential or vice-presidential candidates would not interfere with the normal operation of presidential campaigns. S. Conf. Rep. No. 92-553, 92d Cong., 1st Sess. 53-54 (1971); 117 Cong. Rec. 45,855, 45,857 (1971). *See also Republican National Committee* v. *Federal Election Commission*, 461 F. Supp. at 576.

Congress did not intend, however, by the use of "implement or construe" in § 9011(b) to create an avenue whereby private parties, like Common Cause, could sue to enforce the Fund Act against other parties.[22] Since the Common Cause complaint asked that the district court enjoin activities of defendant-appellees as violations of the Fund Act, there can be

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(CCH) ¶ 9147 (D.N.H. 1980); *Walther* v. *Federal Election Commission*, 82 F.R.D. 200, 202 (D.D.C. 1979); *Walther* v. *Anderson*, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9085 (D. Minn. 1979); *Walther* v. *Biden*, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9084 (D. Del. 1979); *In re Federal Election Campaign Act Litigation*, 474 F. Supp. 1044 (D.D.C. 1979); *Walther* v. *Barnett*, 474 F. Supp. 1051 (D.D.C. 1979); *Walther* v. *Baucus*, 467 F. Supp. 93, 94 (D. Mont. 1979); *Common Cause* v. *Federal Election Commission*, 82 F.R.D. 59, 60 (D.D.C. 1979); *Hemenway* v. *Barnard and Federal Election Commission*, No. 73-1426 (D.D.C. Dec. 21, 1978); *Hampton* v. *Federal Election Commission*, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9036 (D.D.C. 1977), *aff'd* No. 77-1546 (D.C. Cir. July 21, 1978) (unpublished opinion).

[22] Of course, plaintiffs invoking a federal court's jurisdiction pursuant to 26 U.S.C. § 9011(b) must demonstrate sufficient "injury in fact" in order to present a justiciable case or controversy, a requirement which Common Cause has also failed to satisfy. *See* discussion *infra* at 17-19.

little doubt that Common Cause has attempted to bring an action to enforce the statute.

D. Appellants Lack Standing Pursuant to Article III to Press Count I.

The complaint in *Common Cause* v. *Schmitt* alleged that Cohen and Long were eligible to vote for President of the United States in the 1980 election and that their suit was, therefore, authorized by 26 U.S.C. § 9011(b).[23] Although the district court did not find it necessary to decide whether Common Cause was entitled to press Count I, the court observed that in order to invoke the court's jurisdiction, appellants must satisfy the prerequisites of Article III of the Constitution of the United States.[24]

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[23] Common Cause is not one of the plaintiffs eligible to sue under § 9011(b), being neither the "Commission", nor "the national committee of any political party" nor an "individual eligible to vote for President." Rather, Common Cause sued "on behalf of its members" which allegedly include eligible voters. C.C. J.S. App. I at 69a-74a. However, because the Common Cause complaint failed to state a "distinct and palpable" injury to Common Cause members *as voters*, Common Cause may not invoke federal court jurisdiction under § 9011(b). *Cf. Martin Tractor Co.* v. *Federal Election Commission*, 460 F. Supp. 1017, 1019 (1978), *aff'd on other grounds*, 627 F.2d 375 (D.C. Cir. 1980), *cert. denied*, *supra*. *See* discussion *infra* at 17-19. Because Mr. Cohen, who alleged that he is both an eligible voter and a member of Common Cause, joined with Common Cause in bringing this suit, this Court need not address the issue of Common Cause's standing to bring suit on behalf of its members. *See Hunt* v. *Washington Apple Advertising Commission*, *supra*.

[24] In dismissing Count II of *Common Cause* v. *Schmitt*, the district court stated that "our holding dismissing Count II does not require explicit consideration of the Article III 'case or controversy' requirement. As we find ourselves without subject matter jurisdiction we leave open the question of Common Cause's standing to bring Count II of its complaint." FEC J.S. in No. 80-1067, App. A at 29a n.47.

Article III limits the judicial power of federal courts to actual "cases or controversies." *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975). The concept of standing is part of this limitation and an absolute pre-condition to maintaining an action in federal court, *Winpisinger* v. *Watson*, 628 F.2d 133, 137 (D.C. Cir. 1980), *cert. denied*, 446 U.S. 929 (1980), and focuses upon "whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth* v. *Seldin*, 422 U.S. at 498. Involving both constitutional and prudential limitations, the standing requirement fixes the role of the courts in a democratic society. *Id.*

To meet these constitutional requirements, the plaintiff must allege "a distinct and palpable injury to himself," *Warth* v. *Seldin*, 422 U.S. at 501; the injury alleged must be objective and concrete, *O'Shea* v. *Littleton*, 414 U.S. 488, 494 (1974); and "a 'fairly traceable' causal connection between the claimed injury and the challenged conduct" must be asserted. *Duke Power Co.* v. *Carolina Env. Study Group, Inc.*, 438 U.S. 59, 72 (1978).[25] This latter factor requires a showing that there is a " 'substantial likelihood' that the relief requested will redress the injury claimed." *Duke Power Co.* v. *Carolina Env. Study Group, Inc.*, *supra*, 438 U.S. at 75 n.20; *Greater Tampa Chamber of Commerce* v. *Goldschmidt*, 627 F.2d 258, 261 (D.C. Cir. 1980). With regard to prudential considerations, this Court has held that when the claimed harm is a "generalized grievance"

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[25] Compare C.C. J.S. in No. 80-847, App. I at 82a with *Winpisinger* v. *Watson*, 628 F.2d at 139 ("the endless number of diverse factors potentially contributing to the outcome of state presidential primary elections . . . forecloses any reliable conclusion that voter support of a candidate is fairly traceable to any particular event.").

shared in substantially equal measure by all or a large class of citizens, that harm alone does not normally warrant exercise of jurisdiction. *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208 (1974); *Ex parte Levitt*, 302 U.S. 633, 634 (1937); *Frothingham* v. *Mellon*, 262 U.S. 447, 488 (1923). This self-imposed limitation is designed to prevent courts from deciding "abstract questions of wide public significance . . . [where] other governmental institutions may be more competent to address the questions." *Warth* v. *Seldin*, 422 U.S. at 500.

Both the constitutional and prudential aspects of the standing doctrine lead to the conclusion that appellants lack standing to press Count I. Appellants alleged below that the alleged violations of 26 U.S.C. § 9012(f) would injure their right as voters to have the election process free from undue influence.[26] However, such a claim is no more than a generalized interest in the enforcement of the election laws, insufficient to give rise to a justiciable case or controversy. *Sierra Club* v. *Morton*, 405 U.S. 727, 739 (1972) (a mere "interest in a problem" is not sufficient by itself to give rise to a justiciable controversy).[27] Moreover, appellants have not demonstrated that the relief requested—construction of the statute and an injunction against expenditures made by defendant-appellees—would redress the alleged injury to their rights as voters. *Compare Baker* v. *Carr*, 369 U.S. 186, 204-208 (1962); *Daughtrey* v. *Carter*,

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[26] *See* C.C. J.S. in No. 80-847, App. I at 82a.

[27] Congress's enactment of § 9011(b), including as it does appropriate actions brought by eligible voters, may not be read to confer upon appellants "injury in fact." Appellants must still meet the justiciability requirements of Article III. *Buckley* v. *Valeo*, 424 U.S. at 12.

584 F.2d 1050, 1055-57 (D.C. Cir. 1978) with *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. at 223 n.13; *Winpisinger* v. *Watson*, 86 F.R.D. 77, 79 (D.D.C. 1980) ("How other people vote . . . does not in any way relate to plaintiffs' own exercise of the franchise and further does not constitute concrete and specific judicially recognizable injury.") Since the purported injury to appellants as voters rests entirely upon how others voted and other voters' reasons for casting ballots for a particular candidate, appellants do not present a case or controversy sufficient for the invocation of federal court jurisdiction.

CONCLUSION

For the reasons set forth herein, the Commission respectfully submits that this Court is without jurisdiction to consider *Common Cause* v. *Schmitt*.

Respectfully submitted,

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APPENDIX

26 USC § 9011. Judicial review

(a) *Review of certification, determination, or other action by the Commission.* Any certification, determination, or other action by the Commission made or taken pursuant to the provisions of this chapter shall be subject to review by the United States Court of Appeals for the District of Columbia upon petition filed in such Court by any interested person. Any petition filed pursuant to this section shall be filed within thirty days after the certification, determination, or other action by the Commission for which review is sought.

(b) *Suits to implement chapter.*

(1) The Commission, the national committee of any political party, and individuals eligible to vote for President are authorized to institute such actions, including actions for declaratory judgment or injunctive relief, as may be appropriate to implement or construe any provisions of this chapter.

(2) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this subsection and shall exercise the same without regard to whether a person asserting rights under provisions of this subsection shall have exhausted any administrative or other remedies that may be provided at law. Such proceedings shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28, United States Code, and any appeal shall lie to the Supreme Court. It shall be the duty of the judges designated to hear the case to assign the case for hearing at the earliest practicable date, to participate in the

hearing and determination thereof, and to cause the case to be in every way expedited.

28 USC § 1252. Direct appeals from decisions invalidating Acts of Congress

Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam and the District Court of the Virgin Islands and any court of record of Puerto Rico, holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party.

A party who has received notice of appeal under this section shall take any subsequent appeal or cross appeal to the Supreme Court. All appeals or cross appeals taken to other courts prior to such notice shall be treated as taken directly to the Supreme Court.

28 USC § 1253. Direct appeals from decisions of three-judge courts

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

Article III, Section 2, Clause 1 of the Constitution of the United States.

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority,—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between citizens of different States,—between citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

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